SUBJECT INDEX

I. Reference to Official Report of the Opinions Delivered in the Courts Below 1

II. Statement of the Grounds on Which Jurisdiction of the Supreme Court Is Invoked 2

III. Concise Statement of the Case 2

IV. Summary of Argument 2

V. Argument 6

VI. Conclusion 19

Table of Cases, Statutes and Text

Bennett v. *Christy*, 137 Kan. 376, 20 Pac. 2d 813 11

Estate of Park, 147 Kan. 142, 75 Pac. 2d 842 12

Farmers Loan & Trust Co. v. *St. Jo. & Denver City Ry. Co. et al.*, 3 Dillon's Circuit Court Reports 412, 8 Fed. Cases, p. 1053 ..... 17, 18

Farmers Union Jobbing Association v. *Sullivan*, 137 Kan. 196, 19 Pac. 2d 476 8

Harkrader v. *Whitman*, 142 Kan. 186, 49 Pac. 2d 1, l. c. 192 11

Hathaway v. *Davis & Rankin*, 32 Kan. 693, 5 Pac. 29 15

Huddelston v. *Dwyer*, (1943) 322 U. S. 232, 64 S. Ct. 1015, 88 L. Ed. 1246 ..... 3, 4

Kershaw v. *Squier*, 137 Kan. 855, 22 Pac. 2d 468 8

Peatling v. *Baird*, 168 Kan. 528, 213 Pac. 2d 1015 4

Ragan v. *Merchants Transfer and Warehouse Co.*, (1949) 337 U. S. 530, 69 S. Ct. 1233, 93 L. Ed. 1520 3

Riverview State Bank v. *Ernest*, 198 F. 2d 876 1

State v. *Curtis*, 143 Kan. 984, 57 Pac. 2d 22 12

Troxell v. *Cleveland Oil Co.*, 145 Kan. 658-662, 66 Pac. 2d 545 16

STATUTES

28 U. S. C. A., Sec. 1254 2
G. S. Kan., 1949, Sec. 55-203 10
G. S. Kan., 1949, Sec. 67-221 14
G. S. Kan., 1949, Sec. 55-207 ..... 15, 16
G. S., Kan., 1949, Sec. 55-210 16

TEXT

22 Am. Jur. 746 17

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 397.

R. H. ERNEST, TRUSTEE IN BANKRUPTCY FOR NATIONAL PETROLEUM RESERVES CORPORATION, BANKRUPT, PETITIONER,

VS.

RIVERVIEW STATE BANK, A CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

I.

REFERENCE TO OFFICIAL REPORT OF THE OPINIONS DELIVERED IN THE COURT BELOW.

No opinion was delivered by the District Court.

The written opinion of the Tenth Circuit Court of Appeals has just been officially published, 198 F. 2d 876, and is also shown in the record at pages 59-69.

II.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

The petitioner invokes the jurisdiction of this Court under 28 U. S. C. A., Sec. 1254, to determine whether or not the Tenth Circuit Court of Appeals correctly decided that under the laws of Kansas the respondent as a secured creditor had a valid and prior lien on the property of the bankrupt good against the petitioner as trustee in bankruptcy.

III.

CONCISE STATEMENT OF THE CASE.

The Tenth Circuit Court of Appeals held that under the law of Kansas the respondent's security instruments filed for record more than five years before the appointment of the trustee in bankruptcy constituted a valid lien on all the property of the bankrupt, good against the petitioner as trustee in bankruptcy.

Respondent adopts the statement of the case by the Tenth Circuit Court of Appeals shown in the record at pages 59 to 63.

IV.

SUMMARY OF ARGUMENT.

The petition for writ of certiorari should be denied because:

1. As stated on page 7 of the petition for the writ, petitioner relies solely on his assertion that the Tenth Circuit Court of Appeals

> "* * * has decided an important question of local law in a way probably in conflict with applicable local decisions of the State of Kansas * * *."

This Court ordinarily accepts the determination of local law by the Court of Appeals—and no reason for departure from that rule is advanced by petitioner.

One of the most recent statements of the rule that this Court accepts the determination of local law by the Court of Appeals is found in *Ragan* v. *Merchants Transfer and Warehouse Co.*, (1949) 337 U. S. 530, 69 S. Ct. 1233, 93 L. Ed. 1520. It was there in effect argued that the Tenth Circuit Court of Appeals had not correctly decided a question of Kansas law. In reviewing that argument this Court said in the opinion delivered by Mr. Justice Douglas:

> "It is argued that the Kansas statute in question is not an integral part of the Kansas statute of limitations. But the Court of Appeals on a careful canvass of Kansas law in an opinion written by Judge Huxman, a distinguished member of the Kansas bar, has held to the contrary. *We ordinarily accept the determination of local law by the Court of Appeals and we will not disturb it here*" (p. 534) (Italics supplied).

Likewise in this case, in the opinion of the Tenth Circuit Court of Appeals delivered by Judge Bratton there was a "careful canvass of Kansas law"—both statutory law and case law—(Record, pages 59 to 69). From that canvass the Tenth Circuit Court of Appeals correctly arrived at the conclusion that in compliance therewith the respondent had perfected a valid lien on all the property of the bankrupt and good against the petitioner as trustee in bankruptcy.

Another recent decision of this Court reiterating the rule that it will accept the determination of questions of state law by the courts of appeal is *Huddelston* v. *Dwyer*,

(1943) 322 U. S. 232, 64 S. Ct. 1015, 88 L. Ed. 1246, where it was said in a *per curiam* opinion:

> "The decisions of the highest court of a state on matters of state law are in general conclusive upon us, *and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts,* cf. *Ruhlin* v. *New York L. Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290, 58 S. Ct. 860, *supra*" (322 U. S., at page 237) (Italics supplied).

The petitioner has failed to show any exceptional circumstances justifying or requiring departure from the rule that such questions will not be reviewed.

2. The petitioner overlooks and does not cite *Peatling* v. *Baird*, 168 Kan. 528, 213 Pac. 2d 1015, the most recent decision of the Kansas Supreme Court which the Tenth Circuit Court of Appeals cited and from which it quoted the following:

> "It may be conceded without elaboration that the lease was a conveyance of such an interest in the real property described that the recording of it imparted notice to all subsequent purchasers in accord with G. S., 1935, 67-222, see *Derby Oil Co.* v. *Bell*, 134 Kan. 489, 7 Pac. 2d 39, and that when recorded, it constituted an incumbrance to the extent of its terms" (Record, p. 65).

3. All of the points now raised by the trustee in his brief in support of his petition for certiorari with the single exception of one minor point relating to fixtures referred to in the next paragraph hereof, were so effectively answered by the reply brief of respondent filed in the Tenth Circuit Court of Appeals that we set it out here.

Although repeatedly challenged to do so before the Referee and the Court of Appeals, the petitioner has not

cited a Kansas case holding that security instruments of the type involved here must be recorded as chattel mortgages. Furthermore, no such Kansas decision is cited in petitioner's present brief. Petitioner fails to cite such a decision because no such decision exists.

4. The point raised by the petitioner that the Court of Appeals erroneously held the bank's lien valid as to the "buildings, structures, tanks, pipes," etc. (Petition for Certiorari, Point 11, page 7) attached to the leasehold property as the equipment of the oil wells used in producing oil from the leases was so obviously lacking in merit that it was not specifically mentioned in the opinion of the Court of Appeals in reversing the District Court's holding to the contrary. The argument on this point as included in the bank's original brief filed in the Court of Appeals is set out hereafter on pages 6 to 19 of this response.

DARK PAGE BLEED THRU

V.

ARGUMENT.

As the reply brief filed in the Circuit Court of Appeals by Riverview State Bank, the present respondent, concisely replied to the argument on the various points presented to the Court of Appeals by the present petitioner, which points are practically identical with those included in the Petition for Certiorari, we submit for consideration of this Court the following reprint of the reply brief, omitting the caption.

REPLY BRIEF OF APPELLANT AND CROSS APPELLEE, RIVERVIEW STATE BANK.

On behalf of Riverview State Bank, appellant in Case No. 4401, and cross-appellee in Case No. 4402, we file the following short reply brief to the brief filed in the same cases by R. H. Ernest, Trustee, respectively as appellee and cross-appellant.

The Trustee's brief as appellee in Case No. 4401 attacks the validity of the Bank's lien on the leases in Ellis County and Russell County upon the ground that the assignments of additional security covering the leases in those counties *were not filed* for record as chattel mortgages.

The Trustee's brief as cross-appellant in Case No. 4402, on the other hand, with no apology for the inconsistency, attacks the validity of the Bank's lien upon oil and gas produced (the only value to be derived by the leaseholder from his leases) from leases covered by the original mortgage, although copies of that mortgage *were filed* upon the chattel mortgage records in each county where the leases were located.

Upon the basis of the arguments made in the Trustee's brief, oil and gas leases are practically without value as security for production loans. Arguments to such effect are made, notwithstanding most of the drilling for oil in Kansas has for many years been done by lessees who hold the "working interest" and whose drillings are to the extent of millions of dollars annually financed by loans with the leases as security.

The Trustee's brief waves aside, as mere scraps of paper which have no binding force on anyone, division orders and transfer orders, instruments of a special type designed to meet the peculiar conditions existing in the oil industry and universally recognized and accepted by the industry as fixing on a firm and unchallenged basis the division and the transfer to new owners of fractional interests in the sale proceeds of oil from producing wells.

The Trustee's brief contends that neither the mortgage which the Bank held nor the transfer orders and division orders which it held could create valid liens upon the oil runs, his contention is thus stated:

> "Since the oil does not exist and since the lessee has no present ownership, it would appear then that two of the essential elements to a chattel mortgage are lacking and that an instrument attempting to create a lien on the oil later to be produced is void" (p. 35, Trustee's brief).

The trouble with this argument of the Trustee is that it does not rest upon a solid, sound foundation. It rests rather on a straw man which he sets up and then attempts to knock down. As explained in Point 4 of our original brief, commencing on page 29, what the lessee has and what he mortgages are the *rights* to go upon the land of another and to extract and take away therefrom for his

own use the agreed fraction of oil when oil is found and produced. These *rights* clearly do exist and it is clear that they are owned by the lessee who gives the mortgage on them.

The Trustee's brief suggests rather guardedly, and apparently without himself having much faith in the idea, that perhaps the transfer orders ought to have been recorded in the office of the register of deeds. But transfer orders are not, as suggested by the Trustee, chattel mortgages on oil in the ground, nor are they chattel mortgages on oil above ground. They are not recordable instruments.

The transfer by the debtor to the Bank through the instrumentality of a transfer order of the debtor's share in the purchase price of the oil runs is not a mortgage at all. As explained in Point 6 of our original brief, beginning on page 34, it is an assignment of an obligation for the future payment of money.

The situation here, with the Bank holding a mortgage and also transfer orders and collecting through them oil run payments over a period of several years before bankruptcy, is practically identical with the situation in the Kansas cases where the mortgagor gave to the mortgagee an assignment of rents on the mortgaged building and upon request of the mortgagee began turning over the rents to apply on the mortgage. The mortgagee's rights to retain the rents were upheld against garnishment brought by a judgment creditor of the mortgagor (Our original brief, pp. 35-36).

(The Kansas cases thus referred to are *Kershaw* v. *Squier,* 137 Kan. 855, 22 Pac. 2d 468; and *Farmers Union Jobbing Association* v. *Sullivan,* 137 Kan. 196, 19 Pac. 2d 476, which are cited and followed in the opinion of the Court of Appeals.) (R. p. 68.)

Garnishment is a form of attachment, and a garnishing creditor is a "most favored creditor" whose rights are in all respects equal to the rights of a trustee in bankruptcy.

The Trustee makes the final contention that the bankrupt, being owner of a part interest in a producing oil well, he was, as to his share in proceeds of oil runs, a wholesale dealer in "goods, wares and merchandise," and was subject to the provisions of the Kansas "Accounts Receivable Act." Upon that basis, he argues that transfer orders are invalid as to creditors unless notice of their execution is filed in the office of the Secretary of State.

The argument appears to us to fall with its own weight. Oil and gas leases and transfer orders issued by holders of such leases simply don't come within the statute, and the Trustee cites no authorities whatever in support of his contention that they do.

Furthermore, the Bank's rights under the transfer orders antedate the enactment of the Kansas "Accounts Receivable Act" which became effective June 30, 1949, upon publication of the 1949 session laws.

The Trustee's brief argues persistently that the Bank's assignments as additional security of the Ellis County and the Russell County leases, even though properly recorded as instruments whereby real estate may be affected, were invalid as to the Trustee because not also filed for record as chattel mortgages.

No case so holding was cited in the Trustee's brief in this court notwithstanding the following statement in our original brief (p. 22) challenged the Trustee to cite such a case if any could be found:

> "Neither in the briefs filed by the trustee in the court below nor in the memorandum opinion of the

> referee, was any case cited where it was held that an oil and gas lease or any assignment thereof or a mortgage thereon had been held invalid as to a subsequent purchaser or lienholder, because of failure to file the instrument as a chattel mortgage."

The view that the Kansas Supreme Court has ever held that such a recording was necessary is simply a myth.

We believe that the authorities cited in our original brief demonstrate quite conclusively that the assignments to the appellant bank of the Ellis County and Russell County oil and gas leases as additional security for its loan were instruments "whereby real estate may be affected" and that the recording of them as such instruments four years before bankruptcy was proper recording, adequate and effective to protect the appellant's lien against all adverse claimants—including the trustee.

Indeed, the Trustee's brief frankly, though somewhat grudgingly, admits (see Trustee's brief at page 7 and again at page 14) that in the enactment of the various recording statutes quoted from and discussed on pages 19 to 27 of appellant's original brief, the Kansas legislature has adopted laws specifically designed to provide for the recording of oil and gas leases and transfers thereof on the real estate record books in the office of the register of deeds so that those records will fully disclose all material facts relating to oil and gas leases.

The recording of *assignments* of oil and gas leases was particularly dealt with by the legislature in order that all changes of ownership can be determined from the record (55-203, G. S., Kan.). An assignment intended as a mortgage (involving as it does a potential and prospective change of ownership) was by the Kansas Supreme Court expressly held to be sufficiently recorded to protect the

mortgagee's lien when entered on the real estate records (See discussion of and quotations from *Bennett* v. *Christy*, 137 Kan. 376, 20 Pac. 2d 813, on page 23 of our original brief).

The Trustee's brief attempts to nullify the clear intent of the legislature in enacting the statutes dealing with the recording of oil and gas leases by making the bold assertion (unsupported by any citations) that the chattel mortgage statute, being a general statute covering all personal property, must control over special statutes which deal with the same subject—the recording of instruments relating to personal property—but only with those instruments which relate to one class of personal property.

The proper and well established rule of statutory construction is, however, exactly the reverse of that contended for by the Trustee.

It has long been the rule in Kansas, as stated by the Supreme Court of that state in *Harkrader* v. *Whitman*, 142 Kan. 186, 49 Pac. 2d 1, l. c. 192:

> "It is also a general rule that where there is conflict between a statute dealing generally with a subject, and another dealing specifically with a certain phase of it, the specific legislation controls in a proper case."

In the case just cited, the court was called upon to decide which controlled—the general corporation code, which by its terms applied to all corporations and required that a stockholder in order to vote must have record ownership of his stock for at least thirty days prior to a corporate election, or the building and loan association statute authorizing such corporations to adopt by-laws regulating the conditions under which stock was to be voted. It was contended that shares of stock voted pursuant to the

by-laws of the association were not legally voted because the shareholder had not been record owner of the stock for thirty days before the election, and, since a building and loan association is a corporation, the right to vote was conditioned upon compliance with the thirty day ownership provision of the general corporation law. In rejecting this contention, the Supreme Court said:

> "It thus appears that the legislature intended to provide that building and loan associations might fix a test to determine who should and should not vote. Such legislation is in a sense special, for it does not affect all corporations, although it is general in the sense that it affects all building and loan associations. *As special legislation dealing only with one phase of corporate activity it takes precedence of the provisions of the general corporation laws, which retain their full force and effect except as to building and loan associations.* * * * *We have no hesitancy in holding that where the legislature made specific provision that the board of directors of a building and loan association may prescribe the qualifications of electors at stockholders' meetings it was not its intention that in addition to such prescribed qualifications the electors must also be owners of stock which has stood in their names on the books of the corporation for over thirty days prior to the meeting*" (pp. 193-194) (Emphasis supplied).

There are numerous other Kansas decisions wherein the same rule is applied, among them the following:

In re Estate of Park, 147 Kan. 142, 75 Pac. 2d 842.
State v. *Curtis*, 143 Kan. 984, 57 Pac. 2d 22.

That this same principle of construction is applicable to the Kansas recording statutes seems perfectly clear.

While an oil and gas lease is for general purposes personal property, it is a peculiar type of personal property that differs materially from the general class in that, al-

though not technically real estate, it creates rights to invade and remove minerals from real estate belonging to others and hence it is very definitely an instrument whereby real estate not only may be affected but is in fact affected.

Obviously, this limited and peculiar type of personal property called for and the Kansas legislature enacted these various statutes governing the recording of instruments relating to that peculiar type of personal property by providing for recording on the real estate record books in the office of the register of deeds. *As a result of these statutes, an abstract of title on a particular tract of land fully discloses the title to and lien status of the land itself and also all material facts relating to oil and gas leases on that tract.*

After it had made specific provision (in order to accomplish the purpose above indicated) for recording on the real estate record books all instruments that affect real estate as these instruments do, there should be no hesitancy in holding it was not the intention of the legislature that, in addition to such recording, a duplicate recording must be made in another section of the same office where copies of mortgages on horses and cows and automobiles and sewing machines are filed.

No reasonable and logical construction of the Kansas statutes and the Kansas Supreme Court decisions would warrant a destruction of the appellant's lien because there had not been such a duplicate recording of its mortgages.

The Trustee's brief argues in effect that because one out of the three mortgages of the bankrupt which were held by the appellant bank was filed on the chattel mortgage records some sort of an estoppel was created which made such a filing necessary as to all mortgages on oil and gas leases. No doubt, as a gesture of extra precaution, mortgages on oil and gas leases may be filed as chattel mortgages from time

to time by other mortgagees—perhaps even in the ratio of one out of three as in the present case—but the question of what recording is necessary to comply with the statutes is not to be determined by the court upon such a basis.

The Buildings, Structures, Tanks, Pipes, etc., Installed on the Leaseholds by the Lessee As Production Equipment Are in the Nature of Fixtures Which Become a Part of the Leasehold Interest and As Such Are Covered by the Bank's Lien.

The contention urged in the Circuit Court of Appeals and now again urged in the Petition for Certiorari (Petition, pp. 21-22) that this production equipment is purely personal property and is not in the nature of fixtures to which the lien on the leasehold would attach was so lacking in merit that it was rejected by the Circuit Court of Appeals without any special mention in the opinion. In order that the Court may have at hand the Kansas law, we copy below the argument on this point as included in our original brief filed in the Circuit Court of Appeals.

We make no contention that the pumping units, tubes, rods, lines, and tanks are real estate or that they become any part of real estate. What we do contend with reference to this production equipment is that it is an appurtenance, not of the land, but of the leasehold. The Russell County and the Ellis County mortgages granted as security to the bank the leases described, "and all rights therein."

As we have heretofore shown, the mortgage on the leasehold *is an instrument whereby real estate may be affected and as such is properly and sufficiently recorded as provided in G. S. 67-221.* We further contend that production equipment as a fixture, having become a part of the leasehold, is included in the mortgage security without special mention.

It is upon this theory that the statutory mechanic's lien for materials and labor in the installation of such fixtures is fastened not only upon the oil lease itself, but also *upon the "fixtures and appliances used in operating for oil and gas purposes upon the leasehold"* (G. S. 55-207).

The principle was early applied in Kansas in the case of *Hathaway* v. *Davis & Rankin,* 32 Kan. 693, 5 Pac. 29, where a mechanic's lien was held valid for machinery, fixtures, etc., to be used about a creamery which had been erected on leased premises. The court so held on common law principles and without any statute covering the application of that principle to leaseholds. In the opinion, the court says on pages 696-697:

> "We think a mechanic's lien or lien for material or labor may attach in any proper case to a leasehold estate; and the fact that the tenant may have a right to remove his buildings, fixtures and machinery from the leased premises, instead of lessening the lien or preventing it from attaching to the leasehold estate, will, as we think, enlarge the lien and enable the lien holder to obtain greater interest in the leased premises. *The privilege of moving the buildings, fixtures and machinery from the leased premises will not operate to the detriment of the lien holder, but will inure to his benefit. Neither do we think that the fact that for some purposes and under some circumstances the buildings, fixtures and machinery put upon the leased premises by the tenant may be considered as personal property, can have the effect of preventing the lien from attaching. For the purposes of the lien, in such a case the leasehold interest will include the right to the buildings, fixtures and machinery,* and the right to remove them and the whole of such leasehold interest with the buildings, fixtures and machinery, will be considered as an

interest in the real estate, and under the circumstances the lien will attach to all. The statute giving liens for material and labor expressly and specifically mentions buildings, fixtures and machinery, and it was intended by the statute that such liens should attach to the buildings, fixtures and machinery, as well as to the whole of the estate owned by the party contracting for them" (Emphasis supplied).

The Kansas statute (G. S. 55-207) clearly makes oil and gas leaseholds, including equipment, subject to such mechanic's liens.

Another section of the oil and gas statute shows the intent of the legislature to treat mortgages on oil leaseholds in the same manner that mortgages on real estate are treated. The pertinent part of the statute applicable here reads:

> *"All other liens and mortgages on leaseholds for oil and gas purposes shall be enforced and foreclosed in the same manner as may be provided by law for enforcing liens and mortgages against real estate"* (G. S., 55-210).

After quoting this statute, the Supreme Court of Kansas says, in *Troxell* v. *Cleveland Oil Co.*, 145 Kan. 658-662, 66 Pac. 2d 545:

> *"We believe the intention of the legislature was to place liens on oil and gas leaseholds in the same status as liens on real estate generally, save as to the rights of redemption as provided in the last above statute."*

Of course, a mortgage on real estate covers the fixtures which are part of the buildings belonging to the owner of the real estate.

We quote as follows from 22 Am. Jur. 746:

"It may also be stated as a general rule that where the annexation of chattels to land is made under such circumstances as to stamp them with the attributes of fixtures, it makes no difference that such annexation is made subsequent to the execution of a mortgage; *as between the mortgagor and mortgagee, they become subject to the lien of the mortgage, even though not mentioned therein*" (Emphasis supplied).

As shown above, when chattels, under agreement with the landowner, are attached to the land in such manner as to constitute fixtures, they become a part of the land and automatically come under the lien of a mortgage which the landowner has placed on his land.

In like manner, and for the same reason, when chattels, under agreement with the holder of an oil and gas lease, are installed as a part of the lessee's oil production installation in such manner as to constitute fixtures, they become (not a part of the land so as to belong to the landowner) but a part of the lease and automatically come under the lien of a mortgage which the lessee has placed on his lease.

A mortgage on the oil and gas lease, the lien of which did not cover the pumps, pipe and other equipment used in getting the oil out of the ground would be of no practical value. As heretofore shown, the legislature and the courts have joined in establishing the doctrine that such equipment is a part of the leasehold, and that liens which cover the leasehold cover also such equipment.

A principle quite similar to the principle here involved was applied to railroad mortgages in the decision heretofore quoted (*Farmers Loan & Trust Co. v. St. Jo. & Denver City Ry. Co. et al.*, 3 Dillon's Circuit Court Reports 412,

8 Fed. Cases, p. 1053, Case No. 4669). A copy of the opinion in that case is set out as a footnote.*

In the railroad case the rule that chattels which if unattached could not be validly mortgaged as against attaching creditors except by filing for record a chattel mortgage thereon become a part of the property to which they are attached so that no filing as a chattel mortgage is necessary, was applied to engines, cars and other rolling stock of a

---

* CIRCUIT COURT REPORTS.
DISTRICT OF KANSAS, 1875.

FARMERS LOAN & TRUST COMPANY v. ST. JO. & DENVER CITY RAILWAY COMPANY ET AL.

Judge Miller thus stated the facts:

> "Bill to foreclose. The plaintiffs are trustees of a railway mortgage executed by the defendant company to secure bonds. The mortgage covers, *inter alia*, 'the rolling stock and other property appertaining to said railroad.' It was duly recorded as a real estate mortgage, but not as a chattel mortgage, as the latter, to be valid, are required to be recorded by the laws of Kansas (Genl. Stats., p. 584, Sec. 9, *et seq.*). Certain judgment creditors of the mortgagor levied upon the rolling stock embraced in the mortgage; and the question was whether their rights were prior to those of the plaintiffs. This was fully argued before Miller and Dillon, JJ."

Following his brief statement of facts quoted above, Judge Miller's opinion reads:

> "After having taken time to consider the question involved in this case, my judgment is that it was not necessary, as to the rolling stock, to record the instrument as a chattel mortgage. As to this it is sufficient even as to creditors, that the mortgage was duly registered as a mortgage of real estate. In my opinion rolling stock and other property strictly and properly appurtenant to the road, is part of the road and covered by the mortgage in question, which in terms embraces rolling stock. The cases are conflicting upon the point as to the nature of rolling stock, but considering the peculiar character of a railroad, the true principle is the one above stated. Under the provisions of this mortgage a different principle would apply to fuel or other property personal in its nature and which is used, or is such as is commonly used, for other than railway purposes. Such property would be subject to the levy and not be held by the mortgage."

railroad, such property being so "strictly and properly appurtenant to the road" that it becomes a part of the railroad. Upon those grounds it was held that a railroad mortgage recorded only as a real estate mortgage, and not as a chattel mortgage, was valid and superior to the claims of an attaching creditor who sought to seize under his lien part of the rolling stock of the railroad company.

As in the railroad case, the oil production equipment is so strictly and properly appurtenant to the lease that the recording of a mortgage on the oil and gas leasehold validly protects the lien of the mortgage, not only as to the leasehold itself, but also as to the fixtures which are a part of the leasehold.

The decision in the case just cited was accepted as settling the Kansas law on this point; for, in the seventy-five years since the decision was rendered, so far as we can ascertain, no railroad mortgage has been recorded as a chattel mortgage in Kansas, the recording as a real estate mortgage being accepted by all parties as adequate to protect the lien against judgment creditors who might seek to levy on railroad cars or other rolling stock.

VI.

CONCLUSION.

The determination of the cause turned on the question of local law, all of which was carefully considered by the Tenth Circuit Court of Appeals—and no good reason is advanced by the petitioner for departure by this Court from its rule which declines to review such questions.

It is very respectfully submitted that the petition for writ of certiorari should be denied.

T. M. LILLARD,
Topeka, Kansas,
N. E. SNYDER,
Kansas City, Kansas,
A. W. HERSHBERGER,
Wichita, Kansas,
Attorneys for Respondent.

DARK PAGE BLEED THRU